Supreme Court, U.S.
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No. 05-94

IN THE

Supreme Court of the United States

MIKE MCENTEE,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal employee who is campaigning for a nonpartisan political office has a First Amendment right to:

(a) announce, or allow others to announce, his core political beliefs; and

(b) associate with individuals or groups of individuals with political party affiliations.

2. Whether the definitions of nonpartisan political office, for the purposes of determining a Hatch Act violation, used or suggested by the Office of Special Counsel, the Administrative Law Judge, or the United States Court of Appeals for the Federal Circuit are unconstitutionally vague or overbroad, in violation of the freedom of speech and association as guaranteed by the First Amendment to the United States Constitution.

CORPORATE DISCLOSURE STATEMENT AND PARTIES

Petitioner McEntee is an individual.

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PETITION FOR WRIT OF CERTIORARI

Mike McEntee petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The Court of Appeals decision, 1a-26a, is reported at 404 F.3d 1320.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on April 15, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people to peaceably assemble; or to petition the government for redress of grievances.

Title 5, Section 7321 of the United States Code provides:

> It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, the right to participate or to refrain from participating in the political processes of the nation.

Title 5, Section 7323(a)(3) of the United States Code provides:

> . . . an employee may take an active part in political management or in political campaigns, except an employee may not . . . run for the nomination or as a candidate for election to a partisan political office;

Title 5, Section 7323(a)(2) of the United States Code provides:

> . . . an employee may take an active part in political management or in political campaigns except an employee may not . . . knowingly solicit, accept, or receive a political contribution . . .

Title 5, Section 7322(2) of the United States Code provides: -

> "Partisan political office" means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

5 C.F.R. § 734.101 provides:

> "Nonpartisan election" means (1) An election in which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential election received votes in the last preceding election at which Presidential electors were selected.
>
> "Partisan political office" means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

5 C.F.R. § 734.202 provides:

> Employees may take an active part in political activities, including political management and political campaigns, to the extent not expressly prohibited by law and this part.

5 C.F.R. § 734.207 provides:

> An employee may: . . . (b) Run as a candidate in a nonpartisan election. *Example 1:* An employee who is a candidate for public office in a nonpartisan election is not barred by the Hatch Act from soliciting, accepting, or receiving political contributions for his or her own campaign . . .

The Charter of the City of Albuquerque provides:

> Section 4: The ballots shall be printed by the City and shall contain the names of candidates without party or other designation.

The City of Albuquerque Code of Ordinances provides:

> § 2-4-7. Position of Candidates on the Ballot. A: The names of all certified candidates for office shall be listed on the ballot without party or other designation. . . .

STATEMENT OF THE CASE

This case concerns whether the government has the authority to dictate the quality and quantity of the free speech and associations it deems acceptable for federal employees in a nonpartisan election.

Petitioner Mike McEntee is a federal employee who was suspended for four months from his job as an air traffic controller for violations of the Hatch Act. McEntee was a candidate for the nonpartisan office of mayor of the City of Albuquerque, New Mexico, in 2001. The Office of Special Counsel ("OSC") charged McEntee with two Hatch Act violations, contending his campaign for the nonpartisan office was "transformed" into an unacceptably partisan campaign, pursuant to a test announced in *In re Broering*, 1 P.A.R. 778 (1955).

The Merit Systems Protection Board ("MSPB") found a *Broering* transformation based upon McEntee's speech (state-

ments including, but not limited to, "I am a conservative Republican") and recommended a four month suspension. The Federal Circuit affirmed the MSPB, not based on the MSPB's determination that McEntee's speech had transformed the nonpartisan office into a partisan one, but rather on the basis that McEntee had been nominated or elected as representing a major political party and because McEntee had "acted in concert with" a major political party structure. 23a.

This case raises significant First Amendment issues concerning the validity and use of the 1955 *Broering* transformation theory whereby a nonpartisan political *office* is "transformed" into a partisan political *office* whenever an employee steps over an inscrutable, if not imaginary, line between "acceptable" and "unacceptable" speech during a campaign for the nonpartisan office. Even though Hatch Act restrictions must be narrowly construed, First Amendment freedoms must be broadly interpreted, and Congress commands the government to encourage employees to run for nonpartisan offices and to exercise their rights "fully, freely and without fear of penalty or reprisal, and to the extent not expressly prohibited by law," the government suspended McEntee for four months to warn others to avoid "a reoccurrence of the 'bug' that often afflicts those with visions of public office." 36a.

A. Nature Of The Case

1. McEntee's Efforts "to exercise fully, freely and without fear of penalty or reprisal" His Right to Campaign for a Nonpartisan Office

Prior to his campaign for the Albuquerque mayor's office, McEntee had been previously elected to the Albuquerque City Council, a nonpartisan office. He had been identified by the media as a "conservative Republican" or "Republican" for at least four years before his race for mayor of Albuquerque in 2001. To provide the voters with helpful information, the Albuquerque media regularly list the political philosophy or

party of the candidates for the mayoral and council offices. McEntee is a conservative, believes in a Republican philosophy, and is a registered Republican. The Albuquerque City Charter and Ordinance designate the ballot as nonpartisan, but Albuquerque makes no attempt to regulate political speech, or the activities or associations of any candidate in any way.[1]

McEntee was "diligent in his efforts to understand any Hatch Act restrictions, including inquiring about Hatch Act restrictions with the Albuquerque FAA Ethics Counselor before and during his campaign, reviewing the Hatch Act and a list of prohibited and permitted activities before deciding to become a candidate for mayor, and receiving briefings on the Hatch Act during routine ethics training provided by the FAA." 32a. The FAA Ethics Counselor informed McEntee that he could run in the election and referred him to the FAA Regional Counselor. Neither of these persons responsible for Hatch Act interpretations were aware of the *Broering* transformation theory, or prohibitions against "acting in concert with a political party," and both approved McEntee's run for the mayor's office. 32a.

On August 31, 2001, OSC demanded that McEntee quit the mayoral race or his job based upon *Broering*[2] and its

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[1] The Federal Circuit decision conflates the nonpartisan ballot for City Council and Mayoral ballots to a prohibition against partisanship in the campaign: "According to the city ordinances, the mayoral race is intended to be nonpartisan." 2a. (Emphasis added.)

[2] Although the facts and holding of *Broering* are not clearly stated in the one page administrative decision from 1955, the candidate was "sponsored," presumably elected or nominated pursuant to a primary election or caucus. In addition, the evidence to transform the election apparently included a nomination or endorsement by "State or National political parties or the local political committee of such a State or National Party." *Broering* at 779. Herein, no evidence was presented to establish McEntee was elected or nominated to represent the Republican Party. A 790-792, 1098-1102, 1377-1379.